

***United States Court of Appeals  
for the  
District of Columbia Circuit***



**TRANSCRIPT OF  
RECORD**





BRIEF FOR APPELLANT

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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,675

ROOSEVELT ROLLERSON,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District  
Court for the District of Columbia

United States Court of Appeals  
for the District of Columbia Circuit

FILED FEB 28 1964

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February 1964

#### QUESTIONS PRESENTED

1. Whether a defendant is entitled to a directed verdict of not guilty by reason of insanity when at his trial there is received substantial factual evidence that the alleged crime was the product of a mental disease or defect and the only contrary evidence consists of bare conclusory statements of psychiatrists who saw the defendant only once.

2. Whether, in the circumstances described in Question 1 above, it is plain error, noticeable by this Court, for the trial court so to charge the jury as to leave them at best confused as to whether the Government bore the burden of proving that the alleged crime was not a product of mental disease or defect or whether the defendant bore the burden of proving that the alleged crime was a product of mental disease or defect.

3. Whether, in the circumstances described in Question 1 above, it is plain error, noticeable by this Court, for the trial court not to explain clearly to the jury that they could disregard the conclusions of the psychiatrist witnesses they had heard.

4. Whether, when there is on the record of a criminal trial at least a substantial question as to the mental capacity of the defendant, the defendant is entitled to hearing pursuant to Fed. R. Crim. P. 42(b) before being



held in contempt for an incident occurring in the courtroom during his trial.

5. Whether a sentence of one year's imprisonment for contempt of court is not excessive when the allegedly contumacious act was a single, isolated outburst by a defendant described on the record as impulsive, who expressed his regret for his act and whose act the trial court requested the prosecutor to present to the grand jury.

6. Whether a defendant on trial for robbery is entitled to have a mistrial declared when he commits a violent act in the sight of the jury shortly before they are to retire to deliberate.

7. Whether a defendant's conviction of robbery should be set aside if it is determined that the defendant was not responsible for an act of violence committed in the sight of the jury during his trial.

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IN THE  
UNITED STATES COURT OF APPEALS  
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No. 17,675

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ROOSEVELT ROLLERSON,

Appellant,

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On Appeal from the United States District  
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BRIEF FOR APPELLANT

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JURISDICTIONAL STATEMENT

Appellant was tried and convicted in the district court on an indictment charging a single count of robbery in violation of 22 D.C. Code § 2901. He was sentenced to imprisonment for three to nine years. Under the same district court docket number appellant was summarily ordered punished by one year's imprisonment for contempt pursuant to Fed. R. Crim. P. 42(a) for an act committed in the courtroom during his trial. Appellant filed a notice of appeal in this Court, and the district court granted him leave to

proceed on appeal in forma pauperis. This Court has jurisdiction under 28 U.S.C. §§ 1291, 1294 and 1915.

STATEMENT OF THE CASE

A. The Robbery Conviction.

The Government's case with respect to the alleged robbery consisted of the testimony of Mrs. Bessie Dye, the alleged victim, and Metropolitan Police Private Leslie L. Williams, who arrested appellant.

Mrs. Dye testified (Tr. 2-8) that in the early morning of July 22, 1962, at about midnight, she had left her daughter's home and was walking to her own home when, in front of her home at 723 3rd Street, N.W., a man whom she identified as appellant "grabbed my pocketbook" and "struggled with me, pulling at my pocketbook"; when her assailant escaped with the pocketbook and ran across the street and through an alley, she reported the theft to a nearby policeman, who set off in pursuit and returned with appellant; she accompanied appellant and the policeman to the First Precinct headquarters, where appellant said to her, "Lady, I'm sorry for what happened."

Private Williams testified that at the time he apprehended appellant, in a parking lot at 4th and G Streets, N.W., he found a pocketbook that was identified as Mrs. Dye's



in the back of a pickup truck, where he said he had seen appellant throw it. (Tr. 26-33, 40).<sup>1/</sup> In addition, he testified that a small blue purse, identified as Mrs. Dye's, was found in appellant's pocket at police headquarters. (Tr. 30).

With respect to identification of appellant as her assailant after his apprehension, Mrs. Dye testified that what made her identification "positive" was the fact that "the officer that had him, he had my pocketbook." (Tr. 13). She testified that appellant had on a black shirt with vertical white stripes. (Tr. 12). On the other hand, Private Williams testified that appellant was wearing a wool "three-quarter coat," a "car coat." (Tr. 33).

In his defense, appellant testified that he had not taken Mrs. Dye's pocketbook or purse (Tr. 52, 57) and explained that he had been in the neighborhood on other business (Tr. 46-47) and had taken flight when he heard a police whistle "because I had been drinking, and then I was on my conditional release on my Lorton Reformatory" (Tr. 49). Appellant's explanation, in circumstantial detail, of the reasons for his presence near the scene of the purse-snatching

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<sup>1/</sup> At first Private Williams testified that he found the pocketbook on appellant's person when he arrested him. (Tr. 27).

and of what he did after he became the object of police pursuit was repeated on cross-examination without significant change. (Tr. 58-74). Appellant further stated that he had not seen Mrs. Dye at the scene of his arrest but only at headquarters, where he also saw her pocketbook for the first time. (Tr. 50-51). Officers there, he said, had thrown the purse to him and made "some kind of a crack . . . about snatching pocketbooks." (Tr. 52-53). He testified that on the evening in question he was wearing a black shirt with horizontal white stripes (Tr. 54) and was not wearing a coat. (Tr. 55). It was a hot night in July. (Tr. 55). He further denied that he ever told Mrs. Dye or Private Williams that he was sorry, because he had nothing to be sorry for. (Tr. 56-57).

Appellant admitted that in 1947 he had been convicted of assault with attempt to commit robbery and that in 1949 he had been convicted of rape. (Tr. 74).

On the issue of appellant's sanity at the time of the alleged robbery, the defense called Ralph E. Green, Assistant Identification Officer, D.C. Jail, who testified with respect to certain official records pertaining to appellant's stay at the D.C. Jail pending his trial. These included a note written by appellant to the jail superintendent on December 22, 1962, in which he accused the superintendent



of attempting to poison him and stated that a voice had told him not to eat the jail food. The note went on to say

" . . . Then I caught holy hell when the voice came back, but they warned me again and said if I stay here two days or two years I will starve to death before I let you poison me. Don't worry, I haven't eaten since then, so the joke's on you."  
(Tr. 82).

Mr. Green further testified concerning an order committing appellant to "CB-1 Stum Range" "in view of his behavior pattern and in the interest of good custody." (Tr. 83). Mr. Green stated that "CB-1 Stum Range" is a

"range of cells in Cell Block 1, which has approximately ten or 12 cells there where they keep the prisoners away from the rest of the population, where there is a fringe of insanity or are upset, and can't seem to get along with the regular population of men. In other words, that is where we keep men who are slightly off."  
(Tr. 86).

Finally, Mr. Green identified a report of the jail's medical department stating that appellant had been brought from his cell to the medical department after a sharpened piece of metal was found in his possession and said that he had intended to harm himself. (Tr. 84-85).

The Government on rebuttal called three members of the staff of St. Elizabeth's Hospital, where appellant had been confined following his arrest, between October 5, 1962, and a date shortly after December 12, 1962. Dr. Morris M.

Platkin testified that he had interviewed appellant on one occasion, at the medical staff conference held on December 12, 1962, to consider appellant's case. His conclusions were based only upon this single personal observation and upon his review of the file concerning appellant, including the results of various tests that had been conducted upon appellant at the hospital. (Tr. 89-91). These tests included an electroencephalogram, the results of which were "within normal limits," as were, Dr. Platkin said, the results of the other tests. (Tr. 91). Dr. Platkin stated that in his opinion, based on the data he had considered, appellant was not then and on July 22, 1962, had not been suffering from a mental illness or disease or defect, could distinguish between right and wrong, was able to exercise control over his actions and behavior and knew the nature of his actions. (Tr. 91-93). This was the entirety of the Government's direct examination of Dr. Platkin -- which elicited only information concerning the extent of his contact with appellant and his conclusions as to appellant's sanity. With respect to the electroencephalogram, Dr. Platkin stated on redirect examination that "in and of itself it is not particularly valuable, or useful, or a meaningful tool." (Tr. 98). He further stated that there was no indication of any marked behavioral change as a result



of any injury to appellant's head. (Tr. 99). At no time did Dr. Platkin further explain his clinical conclusions.

Dr. David H. Dabney testified that, in addition to participating in the staff conference of December 12, 1962, and studying the various tests that had been performed upon appellant at the hospital, he had seen appellant "at least two times a week on the ward" during the period beginning approximately a week after October 8, 1962. (Tr. 102). He stated that the results of the psychological tests performed upon appellant indicated "that this individual showed signs of being impulsive." (Tr. 103). Dr. Dabney stated his opinion that appellant had "a severe character disorder" which was officially regarded in the nomenclature of St. Elizabeth's Hospital as a "mental disorder." (Tr. 104). He stated that although he felt that appellant could distinguish between right and wrong, had control of his acts, knew the nature of his acts and did not suffer from the type of disorder which would prevent him from resisting the performance of an act (Tr. 106-07), "there were signs of depression in this individual, and it was felt by myself that his behavior could be unpredictable under certain circumstances of stress." (Tr. 108). He went on to explain his usage of the term "mental disorder" as opposed to the terms "psychosis" and "neurosis," discussing the symptoms basic to these

different states. (Tr. 109-10). Moreover, he explained the types of behavior comprehended in the terms "impulsive," "dpression" and "faulty rationalizations" which he had used in characterizing appellant. (Tr. 112-13). In conclusion, Dr. Dabney stated with respect to appellant that "in my opinion he has what you call the sociopathic personality disturbance, with antisocial reaction," and that this was a mental disease, defect and disorder. (Tr. 117).

The final psychiatrist called by the Government was Dr. Glenn Legler, whose contact with the appellant was limited to participation in the staff conference and study of his file. (Tr. 120-21). Dr. Legler's testimony on direct examination was virtually identical with that of Dr. Platkin. He recited his exposure to appellant's case and stated his conclusions that appellant was then and on July 22, 1962, had been without mental disorder, defect or disease, knew the nature of his acts, was able to distinguish right from wrong and was able to control his mental and emotional processes. (Tr. 123-26). Dr. Legler stated, however, that the psychological tests performed upon appellant showed "some elements of feelings of inadequacy on the part of the patient, and some impulsivity in his behavior. But no disorder of his thinking, or his affect." (Tr. 121). Dr. Legler further



stated his opinion that appellant's behavior in jail would not necessarily indicate any mental disorder (Tr. 127-29) but that long incarceration "might influence the person's health -- mental health." (Tr. 129).

The appellant moved for a directed verdict of acquittal both at the close of the Government's direct case (Tr. 42) and after all the testimony was in (Tr. 133). Both motions were denied. (Tr. 43, 133).

The case was submitted to the jury on the defense of insanity as well as on appellant's denial that he committed the offense. The instructions to the jury on the insanity issue (Tr. 147-66) are described and excerpted in Part II of the Argument portion of this brief (pp. 28-41, infra). With respect to the incident described next below the court instructed the jury:

"There was an episode in Court this morning which you observed. You may not consider that, and you will put that entirely aside so far as the question of the defendant's guilt or innocence of the offence charged is concerned. You will put it out of your minds. But you may consider it on the question of his mental condition at the time of the occurrence, that is, the occurrence as charged in the indictment; that is, whether the conduct of the defendant in Court stemmed from a mental disease or whether it was feigned in order to attempt to persuade you that he had a mental disease." (Tr. 149).

The jury returned a verdict of guilty (Tr. 167), and appellant a week later, on February 21, 1963, was sentenced to three to nine years imprisonment. (Tr. 171).

B. The Contempt Conviction.

The trial transcript by order of the court (Tr. 133) shows that at the beginning of the proceedings on February 14, 1963, "defendant threw water pitcher, hitting Assistant District Attorney Schroeder." (Tr. 132). The pitcher was made of plastic. (Tr. 133). Mr. Schroeder, who was the prosecutor actively trying the case, was not injured. (Tr. 132-33). There is no indication of any prior or further disruption. The jury was excused and after an interval the proceedings resumed with the defendant handcuffed. At that time there remained only the final arguments of counsel and the court's charge before the case would be given to the jury. Appellant's trial counsel first requested that the court instruct the jury to disregard the incident but withdrew his request after the judge asked "Do you want that? The basis for it may be insanity." (Tr. 133). The court then stated:

"I will request the District Attorney to present this matter to the Grand Jury, and I will consider contempt committed in the presence of the Court at the time of sentence, if he is convicted in this case.



"If he is acquitted, I will consider it immediately after the acquittal." (Tr. 134).

At the time of the sentencing on February 21, the appellant at the outset of the proceedings offered his apology "for what happened in the courtroom." (Tr. 171). After the robbery sentence was announced, appellant's trial counsel argued that appellant was not responsible for his actions and that a hearing on the contempt matter was required.

"You will recall the testimony on the stand by all the psychiatrists that Rollerson is compulsive, and I think this was one of those moments when he was impulsive.

"As I read the Code, may it please the Court, if he is adjudged to be in contempt of this court, I may be in error but I don't think so, that he is entitled to a trial on those merits." (Tr. 172).

The Court rejected the request for a hearing. Appellant reiterated his apology and stated that "I was fully unaware of what I was doing." (Tr. 173). The Court announced its findings of fact and prepared a certificate and order of contempt pursuant to Fed. R. Crim. P. 42(a). Appellant was sentenced to imprisonment for one year, the sentence to run consecutively with the sentence imposed on him for robbery.

RULE INVOLVED

Rule 42 of the Federal Rules of Criminal Procedure  
provides:

"CRIMINAL CONTEMPT

"(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

"(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment."



STATEMENT OF POINTS

1. The district court erred in not granting appellant's motion for a directed verdict of acquittal of robbery because the evidence concerning appellant's mental condition was such as to compel a reasonable juror to entertain a reasonable doubt as to appellant's responsibility for the act constituting his alleged crime.

With respect to Point 1 (argued at pp. 20-27, infra), appellant invites the Court's attention to the following pages of the reporter's transcript: Tr. 78-130, 133.

2. The district court committed plain error in instructing the jury that to prevail on his defense of insanity appellant must prove that his alleged criminal act was the product of mental disease or defect and in giving instructions that, even when combined with other parts of the charge in which the burden of proof was seemingly placed on the Government, left the matter in confusion.

With respect to Point 2 (argued at pp. 28-35, infra), appellant invites the Court's attention to the following pages of the reporter's transcript: Tr. 147-66.

3. The district court committed plain error when in its charge to the jury it did not make clear to the jurors that they were free to disregard bare clinical conclusions

as to appellant's sanity and criminal responsibility by expert psychiatric witnesses and must reach their own independent legal conclusions as to these matters.

With respect to Point 3 (argued at pp. 36-41, infra), appellant invites the Court's attention to the following pages of the reporter's transcript: Tr. 147-66.

4. Where there was in the record of the robbery trial in which he was the defendant evidence raising at least a substantial question as to appellant's mental capacity, it was impermissible for the district court to proceed against him in the summary way provided for by Fed. R. Crim. P. 42(a) for contempt involving an allegedly contumacious act committed in the course of his trial.

With respect to Point 4 (argued at pp. 42-46, infra), appellant invites the Court's attention to the following pages of the reporter's transcript: Tr. 78-130, 132-34, 170-75.

5. A sentence of one year for contempt of court is excessive when the alleged contempt was a single, insulated outburst by appellant, a defendant in a criminal trial who had been described without refutation as impulsive, who apologized for his action and whose act the trial court requested the prosecutor to present to the grand jury.



With respect to Point 5 (argued at pp. 47-51, infra), plaintiff invites the Court's attention to the following pages of the reporter's transcript: Tr. 78-130, 132-34, 170-75.

6. The trial court erred in not declaring a mistrial when the appellant, on trial for robbery, committed a violent act in the presence of the jury shortly before they were to retire to deliberate his fate.

With respect to Point 6 (argued at pp. 51-53, infra), appellant invites the Court's attention to the following pages of the reporter's transcript: Tr. 132-34.

7. If the appellant's contempt conviction is reversed and the matter remanded for a proceeding pursuant to Fed. R. Crim. P. 42(b) in which the question of appellant's mental capacity can be explored, the judgment of conviction of robbery should be vacated so that it may be set aside and a new trial ordered if appellant is found not to have been criminally responsible for the act committed during his trial; the act committed in the presence of the jury inevitably prejudiced appellant in the eyes of the jurors who witnesses it, and appellant should not be prejudiced by an act for which he is legally as little responsible as he would be for the act of a stranger.

With respect to Point 7 (argued at pp. 53-54, infra), appellant invites

the Court's attention to the following pages of the reporter's transcript: Tr. 132-34, 172-75.

#### SUMMARY OF ARGUMENT

##### I

Appellant's motion for a directed verdict of acquittal should have been granted because of the failure of the Government to carry its burden of proving beyond a reasonable doubt that the offense with which appellant was charged was not the product of a mental disease or defect. The evidence on the point included the considered, factual testimony of a psychiatrist who saw the appellant twice a week during a two-month stay in St. Elizabeth's Hospital and who stated the facts relating to appellant's personality that led him to the belief that appellant had a sociopathic personality disturbance which he considered a mental disease and defect and a severe character disorder. The evidence also included descriptions of appellant's aberrational behavior while in the District of Columbia jail and his outburst in the courtroom. On the other side was testimony consisting of statements of conclusions only by two psychiatrists who had seen appellant only at the staff conference that terminated his stay at the hospital. Given the substantial evidence that appellant was not criminally responsible,



he was entitled to a directed verdict of acquittal by reason of insanity since a reasonable juror could not help but entertain a reasonable doubt of his sanity.

II

A. The jury was not properly instructed that the Government bore the burden of proving beyond a reasonable doubt that the criminal act charged to appellant was not the product of a mental disease or defect. As in Blocker v. United States, 110 U.S. App. D.C. 41, 43, 288 F.2d 853, 855 (1961), the trial court

"first charged the jury in accordance with the law; then in contravention of the law; and finally, once more in accordance with the law . . ."

The appellant's conviction must be reversed because, as in Blocker and the other cases in which this Court has insisted that when the defense of insanity is raised trial judges must consistently follow the burden of proof rule of Davis v. United States, 160 U.S. 469 (1895), in their charges to the jury, one cannot be certain that some or all of the jurors did not follow the incorrect portion of the charge rather than the correct portion.

B. In McDonald v. United States, 114 U.S. App. D.C. 120, 312 F.2d 847 (1962), this Court attempted to make clear that in criminal cases in which expert testimony concerning

insanity is received juries must be allowed to determine for themselves whether a defendant's mental condition is legally a mental disease or defect and that the resolution of this question may not be controlled by the conclusions of expert psychiatric witnesses. In appellant's case the experts testified as to the ultimate issue of "mental disease or defect" in precisely those terms, and the trial court's charge did not make clear to the jurors that they were free to disregard the conclusions of the experts. The court instructed in the same terms the experts used without taking pains to bring home to the jury that the legal definition of the phrase might differ from the sense in which the psychiatrists used it.

The foregoing errors in the trial court's charge were plain errors that should be noticed by this Court under Fed. R. Crim. P. 52(b).

### III

Substantial evidence that at the very least cast grave doubt on his mental capacity was received in appellant's robbery trial. For an outburst of violence committed in the courtroom during his trial appellant was summarily found in contempt of court under Fed. R. Crim. P. 42(a). Under Panico v. United States, 375 U.S. 29 (1963), this procedure was impermissible. Appellant's conviction of contempt must be reversed



and the cause remanded for a plenary hearing under Fed. R. Crim. P. 42(b) to determine the question of appellant's criminal responsibility for his conduct.

IV

The punishment prescribed by the trial court for appellant's act of alleged contempt, imprisonment for one year, is grossly excessive. This Court has power to reduce the sentence or to direct the district court to reduce it. E.g., Green v. United States, 356 U.S. 165, 188 (1958). The alleged contumacious act was an isolated outburst by a defendant who, if not legally blameless for his acts, was an impulsive person under the strain of a criminal trial who apologized for an action of which he told the court he was "fully unaware" at the time. The action did not so gravely threaten to disrupt or obstruct the administration of justice as to justify a one year sentence. Moreover, another sanction, an ordinary criminal proceeding for assault, was available and was availed of to punish the appellant for his act.

V

A. Even in the absence of a request by appellant, the trial court was bound to declare a mistrial when appellant, on trial for an alleged crime of violence, committed a violent act in the sight of jurors who were about to pass upon his

guilt or innocence. Braswell v. United States, 200 F.2d 597 (5th Cir. 1952). No instruction to disregard the incident could erase it from the jurors' minds or eliminate its prejudicial effect.

B. At a minimum, upon a remand of the contempt proceeding against appellant for a plenary hearing, the judgment of conviction of robbery should be vacated so that the robbery matter may be disposed of appropriately after it is determined whether appellant was responsible for his act in the courtroom. If appellant was not legally responsible, then the robbery conviction cannot stand since appellant was inevitably severely prejudiced by his outburst, which, if appellant was not responsible for it, was legally the equivalent of an act of a third party.

#### ARGUMENT

- I. IT WAS ERROR NOT TO DIRECT A VERDICT OF ACQUITTAL, AS REQUESTED, FOR FAILURE OF THE GOVERNMENT TO REBUT THE SUBSTANTIAL EVIDENCE OF APPELLANT'S INSANITY AT THE TIME OF THE ALLEGED ROBBERY.

Appellant moved twice for a directed verdict of acquittal--at the close of the Government's case and again after all the evidence was in. (Tr. 42, 133). The latter motion should have been granted. Evidence of appellant's insanity, confirmed by the only useful evidence of the Govern-



ment on the point, was such as to compel a reasonable juror to entertain a reasonable doubt of appellant's sanity.

Dr. David H. Dabney, one of the three psychiatrists who testified concerning appellant's sanity--the Government's own witness and the only one of the three psychiatrists who had seen appellant more than once--stated that in his opinion appellant suffered from "the sociopathic personality disturbance, with antisocial reaction," which he considered a mental "disease and a defect" and "a severe character disorder," and which was termed as such in the official nomenclature of St. Elizabeth's Hospital. (Tr. 104, 117) (see Blocker v. United States, 107 U.S. App. D.C. 63, 274 F.2d 572 [1959]). These conclusions were based on Dr. Dabney's extensive clinical contact with appellant, including at least two visits a week beginning approximately one week after appellant was committed to St. Elizabeth's Hospital on October 5, 1962, and ending on December 12, 1962 (a total therefore of at least sixteen successive visits), as well as on his study of the mental status examination and various psychological tests administered to appellant at the hospital and his participation in the medical staff conference concerning appellant at the end of the appellant's stay in the hospital. (Tr. 102-03). Moreover, Dr. Dabney supported his conclusion with testimony describing the elements

of applicant's personality disturbance or mental disorder. Thus, Dr. Dabney stated that in the tests administered to appellant he "showed signs of being impulsive," that his personal study of appellant showed that "there were signs of depression in this individual" and "that his behavior could be unpredictable under certain circumstances of stress." (Tr. 103, 108). Moreover, he gave a full explanation of what he meant by the various terms which he used in describing appellant's personality. (Tr. 109-13).

In addition to Dr. Dabney's reasoned testimony that appellant suffered from a mental disorder, disease or defect, there was evidence of appellant's highly abnormal behavior while in the District of Columbia jail in December 1962 and January 1963. Appellant had written a note to the jail superintendent in which he stated that "a voice" had told him of a plot to poison him and had warned him not to eat the jail food. In fact, for some time appellant "refused to eat at all." Appellant was transferred to "CB-1 Stum Range," an isolation ward "where we send men who are slightly off." Subsequently, according to a report from the medical department of the jail, appellant was found with a sharpened piece of metal with which he had stated his intention to harm himself. (Tr. 78-86). In addition there was the evidence the jury itself saw of appellant's irrational



behavior in the courtroom during the trial. (Tr. 132).

It has, of course, been established since the Supreme Court's decision in Davis v. United States, 160 U.S. 469 (1895), that when--as in the case at bar--substantial evidence of insanity has been presented, the Government has the burden of producing evidence sufficient for the jury to find beyond a reasonable doubt that the defendant's actions were not caused by insanity. The Government did not carry this burden in appellant's case.

The only evidence tending to support a finding of defendant's mental competence at the time of the alleged crime consisted of the conclusory statements of Drs. Platkin and Legler--unsupported by any explanation or discussion of symptoms--that in their opinion appellant was not suffering from a mental illness, disease, defect or disorder. The opinions of both doctors were based entirely upon their brief contact with appellant when he appeared before the single staff conference and their examination of the written reports of the tests that the hospital staff had given to appellant (See pp. 5-7, 8-9, supra.)

One such test was the electroencephalogram. It was about the only matter that was explored beyond bare conclusions in the examination of either Dr. Platkin or Dr. Legler. Appellant's electroencephalogram was said to have been normal. But

Dr. Platkin acknowledged that "in and of itself it is not particularly valuable, or useful, or a meaningful tool." (Tr. 98).

Dr. Legler agreed with Dr. Dabney that the tests performed on appellant showed "some impulsivity in his behavior" but countered this with the unexplained conclusion that there was "no disorder of his thinking, or his affect" (Tr. 121); he also stated, however, that after long incarceration, such as appellant's, a person's "mental condition" could be "affected." (Tr. 129). Neither doctor gave any explanation whatever of the reasoning behind his conclusion that appellant did not suffer from a mental illness, disease, defect or disorder. Neither discussed the nature or effect of the abnormalities of appellant's personality that the psychological tests, Dr. Dabney's observation, the reports of appellant's behavior in jail and appellant's courtroom outburst had suggested to exist.

In leaving unexplained the reasoning underlying their conclusions, the testimony of the doctors violated the admonition of Carter v. United States, 102 U.S. App. D.C. 227, 236, 252 F.2d 608, 617 (1957), that

"Unexplained medical labels--schizophrenia, paranoia, psychosis, neurosis, psychopathy--are not enough. Description and explanation of the origin, development and manifestations of the alleged disease are the chief functions



of the expert witness. The chief value of an expert's testimony in this field, as in all other fields, rests upon the material from which his opinion is fashioned and the reasoning by which he progresses from his material to his conclusion; . . . ."

In McDonald v. United States, 114 U.S. App. D.C. 120 321 F.2d 847 (1962), this Court, in an en banc opinion, set forth what it termed a "judicial definition" of "mental disease or defect," to be used in guiding a jury in the application of the test laid down in Durham v. United States, 94 U.S. App. D.C. 228, 214 F.2d 862 (1954). Although this section of the McDonald opinion deals primarily with the jury instructions, it also, like Carter, illuminates the question of the kind of evidence the Government must produce to carry its burden of proving sanity beyond a reasonable doubt.

"Our purpose now is to make it very clear that neither the court nor the jury is bound by ad hoc definitions or conclusions as to what experts state is a disease or defect. What psychiatrists may consider a 'mental disease or defect' for clinical purposes, where their concern is treatment, may not be the same as mental disease or defect for the jury's purpose in determining criminal responsibility. Consequently, for that purpose the jury should be told that a mental disease or defect includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls. Thus the jury would consider testimony concerning the development, adaptation and functioning of these processes and controls.

"We emphasize that, since the question of whether the defendant has a disease or defect is ultimately for the triers of fact, obviously its resolution cannot be controlled by expert opinion.<sup>7/</sup> The jury must determine for itself, from all the testimony, lay and expert, whether the nature and degree of the disability are sufficient to establish a mental disease or defect as we have now defined those terms.

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<sup>7/</sup> See, however, *Isaac v. United States*, 109 U.S. App. D.C. 34, 284 F.2d 168, where the evidence required the direction of a judgment of acquittal by reason of insanity." 114 U.S. App. D.C. at 124, 312 F.2d at 851.

Judged against this unequivocal statement of the matters the jury must consider in passing upon a defendant's sanity, the Government's evidence in the case at bar was no better than no evidence at all. As we have shown, the evidence that favored appellant's sanity consisted entirely of "ad hoc definitions or conclusions as to what experts state is a disease or defect." There was no testimony, except that of Dr. Dabney, "concerning the development, adaptation and functioning of these [mental or emotional] processes and [behavior] controls." In short, the jury received none of the raw material on which it could base the required determination of its own that defendant was sane. See Carter v. United States, 102 U.S. App. D.C. 227, 236, 252 F.2d 608, 617 (1957).



As a result of the absence of evidence tending to show appellant's sanity which the jury could use in its deliberation, the Government failed to carry its burden of proof as surely as if it had presented no evidence at all purporting to show appellant's mental competence. Nor did the Government make any attempt to present evidence tending to meet its alternative burden of showing that the alleged robbery was not a product of appellant's insanity.<sup>2/</sup> See, e.g., Frigillana v. United States, 113 U.S. App. D.C. 328, 307 F.2d 665 (1962). Thus, appellant's showing on insanity was, as a legal matter, undisputed and a verdict of acquittal by reason of insanity should have been directed as requested by appellant's trial counsel at the close of all the evidence. See, e.g., Frigillana v. United States, supra; Isaac v. United States, 109 U.S. App. D.C. 34, 284 F.2d 168 (1960); Satterwhite v. United States, 105 U.S. App. D.C. 398, 267 F.2d 675 (1959); Wright v. United States, 102 U.S. App. D.C. 36, 250 F.2d 4 (1957).

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<sup>2/</sup> Of course, it was not necessary for appellant to present affirmative evidence that said in so many words that there was a causal relationship between his mental disorder and the crime. "The introduction of competent evidence of mental disorder raises the issue of causality sufficient for jury consideration." McDonald v. United States, 114 U.S. App. D.C. 120, 123, 312 F.2d 847, 850 (1962), citing a number of other cases.

II. EVEN IF THERE WAS SUFFICIENT EVIDENCE OF INSANITY TO TAKE THE QUESTION TO THE JURY, THE COURT'S INSTRUCTIONS ON THE POINT WERE INSUFFICIENT AND ERRONEOUS AND CONSTITUTED PLAIN ERROR IN VIEW OF THE WEAKNESS OF THE GOVERNMENT'S EVIDENCE.

A. The Instructions on the Burden of Proof With Respect to the Insanity Issue Were Erroneous, Calculated at Best to Mislead and Confuse the Jury.

When the jury nevertheless convicted appellant in the face of the substantial evidence of his want of mental responsibility, it was very probably because the jurors gathered from the instructions that were given to them that he must prove such a want to their satisfaction, not merely raise a reasonable doubt in their minds. In Davis v. United States, 160 U.S. 469 (1895), the Supreme Court laid upon the Government the burden of proving sanity beyond a reasonable doubt in any federal criminal case in which some evidence of insanity is introduced. In Blocker v. United States, 110 U.S. App. D.C. 41, 288 F.2d 853 (1961), this Court emphasized, as it had on a number of prior occasions,<sup>3/</sup> that the jury must

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<sup>3/</sup> Isaac v. United States, 109 U.S. App. D.C. 34, 36-37, 284 F.2d 168, 170-71 (1960); Carter v. United States, 102 U.S. App. D.C. 227, 233, 252 F.2d 608, 614 (1957); Wright v. United States, 102 U.S. App. D.C. 36, 43, 250 F.2d 4, 11 (1957). See also Kwosek v. State, 8 Wisc. 2d 640, 100 N.W.2d 339 (1960); People v. Kelly, 302 N.Y. 512, 99 N.E.2d 552 (1951).



be instructed in accordance with the rule of the Davis case. The lesson of these cases is that, despite problems of phraseology that may be difficult, the trial court, in charging a jury on the insanity issue, must be consistent in describing the defense in such a manner as to make clear that the burden of proving sanity beyond a reasonable doubt remains upon the Government. This Court reversed Blocker's conviction because the trial court

"first charged the jury in accordance with the law; then in contravention of the law; and finally, once more in accordance with the law . . . ." 110  
U.S. App. D.C. at 43, 288 F.2d at 855.

The insanity instructions in the case at bar suffered from precisely this same fatal defect. Here, as in Blocker, the court began with a proper statement that the Government must prove "beyond a reasonable doubt that the defendant was mentally responsible for his act." (Tr. 156; see also Tr. 159, 160). Then, however, the court lapsed into the "if you find" phraseology that this Court so clearly condemned in Blocker and continued for more than three consecutive transcript pages to speak to the jury in terms that apparently placed on appellant an affirmative burden to prove that he was insane.

One variant of the "if you find" formula that the Court repeatedly used was the statement that in order to return a verdict of not guilty by reason of insanity the jury must be

able to "draw a reasonable inference" that appellant was not responsible for his act -- not that there need only be a reasonable doubt that the act was not the product of mental disease or defect but that an affirmative inference must be drawn that it was.<sup>4/</sup> The somewhat awkward phraseology that must be used in any formulation of the Durham test that is intended to tell the jury when it may or must acquit may tend to obscure the difference between these two statements. But it becomes

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<sup>4/</sup> It is true that the court's statements to this effect were drawn from Carter v. United States, 102 U.S. App. D.C. 227, 252 F.2d 608 (1957), but they were not drawn from that part of the Carter opinion which related to jury instructions. What the court said in Carter was:

"When we say the defense of insanity requires that the act be a 'product of' a disease, we mean that the facts on the record are such that the trier of the facts is enabled to draw a reasonable inference that the accused would not have committed the act he did commit if he had not been diseased as he was."<sup>16/</sup>

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"<sup>16/</sup> This is the manner of stating the defense. The burden of proof in respect to this defense, once it is raised, is on the Government. So the issue to be put to the jury, as we later indicate, is whether the Government has met this defense beyond a reasonable doubt." 102 U.S. App. D.C. at 236, 252 F.2d at 617.

The Court's phraseology when it came to indicate how the case was to be put to the jury was very different from the foregoing

(Footnote cont'd)



apparent that there is a very great difference when the two are used in connection with an insanity test other than the Durham test. No one would contend that "If on the evidence you have a doubt grounded in reason that the defendant knew right

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(Footnote cont'd from p. 30)

quotation. The Court noted that to approach the question from the standpoint of when the jury might acquit by reason of insanity was perhaps not clear because of the number of negatives that must be used. It concluded by saying that the substance of what the jury should be told was:

"If you believe beyond a reasonable doubt either that he was not suffering from a diseased or defective mental condition or that the act was not the product of such abnormality, you may convict." Id. at 237, 252 F.2d at 618.

As its statement quoted in the text (p. 33, infra) shows, the district court used a paraphrase of footnote 16 of the Carter opinion to introduce what was meant as its final and accurate statement of where the burden of proof lay. This was by no means enough. A manner of speaking that is clear and not at all confusing when an appellate court is speaking to a trial court and members of the bar may be most unclear and confusing when a trial court is speaking to lay jurors. It is doubtful that the most conscientious, closely-attendant juror would understand that the words "Now, what I have said to you is in some respects the manner of stating the defense" (Tr. 164) meant that he was now about to be disabused of the impression he must have gained from what had gone before that to acquit by reason of insanity he must make a positive finding or draw an affirmative inference.

from wrong, you must acquit" is the equivalent of "If you are able reasonably to infer from the evidence that the defendant did not know right from wrong, you must acquit."

The prejudicial language in this part of the charge was as follows:

"Thus your task will not be completed upon finding that the defendant suffered from a mental disease or defect. He would still be guilty of his unlawful act if he committed it, if there was no causal connection between such mental abnormality and the act . . . (Tr. 160).

". . . This means that there must be a relationship between the mental condition and the criminal act. The relationship must be such as to justify a reasonable inference that the act would not have been committed if the accused had not been suffering from the disease or defect . . . (Tr. 161).

". . . There must be a relationship between the disease or defect and the criminal act, and the relationship must be such as to justify a reasonable inference that the act could not have been committed if the person had not been suffering from such a disease . . . (Tr. 162).

". . . I mean to say that the facts if found are such that the jury is enabled to draw a reasonable inference that the defendant would not have committed the act, if he did commit it, if he had not been mentally diseased or defective, as he was . . . (Tr. 162).

"The phrase 'product of' is not intended to be precise but means that the facts concerning the disease or defect or the facts concerning the act are such as to justify reasonably the conclusion that but for the disease or defect the act could not have been committed.



"The problem for you is whether the accused was suffering from a mental disease or defect as I have defined those terms, and if you find that he was, whether there was a relationship between such disease or defect and the criminal act. And, if so, whether that relationship was such as to justify a reasonable inference that the accused would not have committed the act if he had not had the disease or defect of the mind." (Tr. 163).

As in Blocker, the instructions in the case at bar then returned to language that attempted to state the Government's burden properly. The entirety of this language follows:

"Now, what I have said to you is in some respects the manner of stating the defense. As I have told you, the burden of proof in respect of this defense is on the Government, and the issue to be put to you is whether the Government has met this defense beyond a reasonable doubt. That is, the jury must find beyond a reasonable doubt in order to return a verdict of guilty, notwithstanding the defense of insanity, that the accused is free of mental disease or defect, as I have defined those terms, or finding that he had a mental disease or defect, that no relationship existed between the disease or defect and the criminal act which would justify the conclusion that 'but for the mental disease or defect' the act would not have been committed.

"Therefore, if you believe beyond a reasonable doubt either that he was not suffering from a mental disease or defect, or, if he was, that the alleged criminal act was not the product of such abnormality, you may convict if you find him to be otherwise guilty." (Tr. 164-65).

Even if the language was entirely clear, as some of it was not, it was no more able to cure the misunderstanding or confusion created by the lengthy preceding passage in which the burden had been stated as falling on appellant than was the similar language in Blocker. Moreover, the corrective passage was followed by this confusing sentence, which was the court's last statement on the insanity issue:

"If you find to the contrary, your verdict must be that the defendant is not guilty by reason of insanity." (Tr. 165).

Whatever the court meant by this last use of the "if you find" formula, it is likely that at least some of the jurors were reminded by it of the "if you find" language that preceded the corrective language. As in Blocker, one cannot be certain that some or all of the jurors did not act on the incorrect portion of the instructions rather than the correct portion.

This, then, is not a case like Redfield v. United States, D.C. Cir. No. 17,818, decided Jan. 30, 1964, where "at one point" in its charge the district court improperly stated the burden on the sanity issue but where the instructions taken as a whole gave the jury correctly to understand where the burden lay. Slip op., p. 3. Rather, it is precisely within the precepts of Blocker and the cases that preceded



Blocker in this Court, which themselves are simply applications of the 70-year-old rule of Davis v. United States that where the issue of sanity is raised on the evidentiary record in some substantial manner the Government must prove the defendant's sanity beyond a reasonable doubt. That rule can have vitality, can be something more than an item of lawyer's lore, only if its purport is brought home with all the clarity possible to the lay jurors who must apply it. These lay jurors are persons who likely have a vague, imperfect notion of the presumption of sanity and who certainly are aware of the fact of everyday life that underlies the presumption -- that most people are sane -- and who therefore would readily accept any suggestion that a defendant should bear the burden of proving that he is an exception to a general condition. The instructions in the case at bar did not convey with anything like the necessary clarity and force the idea that, to the contrary, the Government bears the burden that must seem strange to a layman of proving that the defendant is like most other people.

B. The Instructions Did Not Make Clear To the Jury That It Was Not Bound by the Conclusory Statements of Two of the Psychiatrists That Appellant Did Not Suffer From a "Mental Disease or Defect" and Must Reach Its Own Independent Conclusion on this Matter.

As has been pointed out, Drs. Platkin and Legler testified in conclusory terms that it was their clinical opinion that appellant, at the time of the alleged robbery, did not suffer from a mental illness, disease, defect or disorder. Even if it was not error to refuse to direct a verdict of acquittal because of the fatal inadequacy of this testimony without more, and leaving aside any question as to the propriety of thus permitting psychiatric experts to testify in terms of ultimate legal conclusions, see, e.g., Blocker v. United States, 110 U.S. App. D.C. 41, 50, 288 F.2d 853, 862 (1961) (Burger, J., concurring), it was surely error for the trial judge to fail to make absolutely clear to the jury -- as explicitly required by the passage from McDonald v. United States, 114 U.S. App. D.C. 120, 312 F.2d 847 (1963), quoted at pp. 25-26, supra -- that they were in no way bound to accept the psychiatrists' clinical conclusions but must determine independently for themselves whether there was a "mental disease or defect" as a legal matter.

To be sure, the charge recited, virtually verbatim, two sentences from the quoted passage in McDonald.



"Mental disease and mental defect includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior control. In considering whether the defendant was suffering from a mental disease or defect you will consider any testimony in this case concerning the development, adaptation and functioning of these processes and control." (Tr. 160-61).

However, neither this mechanical recitation nor any other language in the charge brought home to the jury what this Court in McDonald emphasized most forcefully -- that the jury's "resolution cannot be controlled by expert opinion" but must be based on its own opinion drawn from underlying data and explanations offered by the experts. The jury must decide, as the result of its own deliberation, whether the Government has proved beyond a reasonable doubt that no mental disease or defect as defined by the law was present. Accordingly it must be made clear to the jury that a psychiatrist's conclusion that there was or was not a "disease or defect" as clinically defined is another matter entirely from the conclusion which the jury must reach. Rather than making this clear, the constant reiteration in the Court's charge of a magical "disease or defect" formula as the key to the question whether there should be an acquittal by reason of insanity must have led or gravely risked leading the jury to believe that the conclusion of a majority of the psychiatrists that there was no "disease or defect" was conclusive upon them.

The portion of the charge dealing with the insanity issue began with a summary of the evidence of defendant's conduct in jail and proceeded to a synopsis of the psychiatrists' conclusions as to whether these actions and the other data they had considered indicated the presence or absence of a "disease or defect." The judge then said:

"It is proper for you to consider both the jail records of irrational conduct and the opinions of the psychiatrists, but in the final analysis on the issue of sanity or insanity, like all other issues of fact, is to be determined by you and you will be required to decide whether the government has established beyond a reasonable doubt that the defendant was not suffering from a disease, mental condition or defect at the time in question, or that the act was not the product of such a condition, if one existed." (Tr. 159; emphasis added).

The only direct admonition to the jury that they need not regard themselves as bound by the conclusions of the psychiatrists was contained in the following single sentence:

"While it is proper for you to consider the opinions of experts you are not bound to follow the conclusions of any one of them, because in the final analysis the issue of sanity or insanity is to be determined by you, the jury." (Tr. 159; emphasis added).

Neither of these two sentences at the beginning of the insanity charge brought home the vital message of McDonald that the jury must form its own opinion as to the legal existence of a "disease or defect," and that this legal concept is a different



one from the clinical concept contained in the expert's conclusions. At most, they might have led the jury to believe that in its determination "in the final analysis" on the issue of "sanity or insanity" it was to base its decision on some amalgam of the experts' conclusions as to the existence of a "disease or defect" and its own conclusion as to whether the alleged robbery was the "product" of any "disease or defect" which the experts had found to exist. Nowhere was it made clear that the jury must determine de novo the basic question as to the existence of a "disease or defect."

Indeed, the remainder of the insanity charge was primarily a reiteration of the talismanic "disease or defect" formula -- at least thirty different times. In summing up, the judge phrased the basic question this way:

"The problem for you is whether the accused was suffering from a mental disease or defect as I have defined those terms, and if you find that he was, whether there was a relationship between such disease or defect and the criminal act. And, if so, whether that relationship was such as to justify a reasonable inference that the accused would not have committed the act if he had not had the disease or defect of the mind." (Tr. 163).

Neither this nor the mechanical quotation of two sentences from the McDonald opinion nor the judge's other elaborations concerning the meaning of "disease or defect" were of any substantial assistance in making clear to the jury the crucial point that

they must re-examine for themselves, in legal terms, the experts' confident clinical conclusions. These discourses on the meaning of the terms could have been understood as nothing more than glosses on the experts' clinical terminology to permit the jury to understand it; there was no indication that an independent legal standard was being given for the jury's own use.

These inadequacies in the charge might not have been fatal had the testimony of the Government's experts delved into the reasons underlying their clinical conclusions. But in view of the fact that the testimony of the two psychiatrists was phrased almost solely in terms of the existence or absence of a "disease or defect," the charge's constant reiteration of this same magic formula without adequate explanation was highly prejudicial. Even if the jury might otherwise have understood the nature of its obligation to decide, it is inconceivable



that it could have when, as here, the testimony purporting to prove sanity contained none of the raw material on which the jury could have reached an independent conclusion as to whether appellant suffered from a mental disease or defect. And even if the jury might have understood that it need not rubber-stamp the conclusions of the experts on this aspect of the insanity defense, it surely was given no reason to understand that in reaching its own conclusion it should apply a legal standard essentially different from the clinical standard of the experts and should do more than decide whether it agreed with the experts' conclusions in the experts' own terms. Thus, the vital message of McDonald was left unspoken.

The errors in the district court's charge described above were plain errors affecting substantial rights, which this Court should notice under Fed. R. Crim. P. 52(b).

III. IT WAS ERROR FOR THE COURT TO CONVICT APPELLANT OF CONTEMPT SUMMARILY WITHOUT A HEARING TO CONSIDER THE INSANITY DEFENSE PRESENTED.

Contempt of court stands apart in some respects from the other crimes with which it is listed in Title 18 of the United States Code.<sup>5/</sup> Congress has not prescribed a punishment or range of permissible punishments for contempt as it has for other offenses, and certain of the procedural safeguards ordinarily associated with criminal trials are not applicable to contempt. But in the rule that a defendant may not be punished unless his mental condition at the time of the alleged crime was such that it is proper to hold him responsible for what, objectively, he did,<sup>6/</sup> contempt is quite like other serious federal criminal offenses. An immediate consequence of this is that the summary procedure of Rule 42(a) of the Federal Rules of Criminal Procedure, which permits punishment for contempt without any trial-type inquiry into the facts, may not be used where there is a factual question as to the

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<sup>5/</sup> Section 401 of Title 18 describes the acts for which federal courts may punish persons as for contempt of their authority.

<sup>6/</sup> "A common-law crime consists of an act and a vicious mind prompting the act. The common-law axiom was 'Actus non facit reum, nisi mens sit rea.' The basic import of the criminal law is punishment for a vicious will which motivates a criminal act. . . . An insane man is not held responsible, because he has not a criminal mind in respect to the act he committed." *Carter v. United States*, 102 U.S. App. D.C. 227, 235, 252 F.2d 608, 616 (1957).



mental capacity of the defendant. Where there is such a question, the alleged contemnor can be proceeded against only under Rule 42(b), which provides for notice, an opportunity to defend and a judicial hearing on the facts.

So the Supreme Court has held just this Term. Its decision requires reversal of the contempt conviction of appellant.

In Panico v. United States, 375 U.S. 29 (1963), which is striking in its similarity to this case, a defendant whose sanity had been brought in question was summarily convicted of contempt for conduct at his trial. The Supreme Court reversed on the certiorari papers, deeming it unnecessary even to hear argument. It held that "the fair administration of criminal justice requires a plenary hearing under Rule 42(b) of the Federal Rules of Criminal Procedure to determine the question of the petitioner's criminal responsibility for his conduct." 375 U.S. at 30. The summary procedure of Rule 42(a) may not be used when a substantial question has been raised whether the defendant "was suffering from a mental illness which made him incapable of forming the criminal intent requisite for a finding of guilt." Ibid.

The Court did not, in its brief per curiam opinion, elaborate the reasoning supporting this conclusion. It is, however, succinctly stated in Judge Friendly's opinion

dissenting from the judgment of the court of appeals that the Supreme Court reversed:

"The summary procedure authorized by F. R. Crim. Proc. 42(a) rests on the basis, as its words clearly imply, that 'There is no need of evidence or assistance of counsel before punishment, because the court has seen the offense,' *Cooke v. United States*, 267 U.S. 517, 534, 45 S. Ct. 390, 69 L. Ed. 767 (1925). Although Judge MacMahon 'saw or heard' Salvatore's physical acts, he had not and could not have seen 'the conduct constituting the contempt,' when an essential element of that conduct was a 'vicious will' and a substantial issue had been raised as to Salvatore's capacity to possess one." *United States v. Panico*, 308 F.2d 125, 129 (2d Cir. 1962).

There had been, as pointed out above, a very substantial question raised at the trial concerning appellant's sanity. Although the question material to the trial on the robbery charge -- and the only question decided by the jury -- was whether appellant was sane at the time of the alleged robbery on July 22, 1962, the evidence presented on this question also raised a serious question as to appellant's sanity in late December 1962 and January 1963, scarcely more than a month before the incident of February 14, 1963, that led to the contempt conviction. (See pp. 4-9, supra.) The weighty psychiatric evidence of insanity offered by Dr. Dabney was based on examinations occurring as recently as December 12, 1962.

That the incident found contumacious may have been a symptom and thus a product of a mental disease or defect of



the appellant was clearly recognized by the district judge. Appellant's trial counsel objected to his being sentenced for contempt without this insanity question being resolved; he urged that there be "a trial on those merits." (Tr. 172) Earlier in a discussion at the bench immediately following appellant's outburst the judge raised the mental capacity question sua sponte when, in response to defense counsel's instinctive, quite natural request that the jury be asked to disregard the incident, he inquired: "Do you want that? The basis for it may be insanity?" (Tr. 133) Again, in instructing the jury to disregard the incident insofar as the question of appellant's guilt of robbery was concerned, the judge pointed out the pertinence of the incident to the question of appellant's sanity. (P. 9 , supra).

It is, of course, irrelevant that the district court had necessarily adjudged that appellant was competent to stand trial. The criteria for competency to stand trial and for criminal responsibility are different. E.g., Lyles v. United States, 103 U.S. App. D.C. 22, 26-27, 254 F.2d 725, 729-30 (1957), cert. denied, 356 U.S. 961 (1958). In the Panico case, the Supreme Court, in pointing out that no hearing was had on the question whether the petitioner was disabled by mental illness from forming the intent necessary to guilt of contempt, noted that during the trial "the judge had heard conflicting expert testimony upon the different question of

the petitioner's mental capacity to stand trial." 375 U.S. at 30. (Emphasis added). More than that, in the certificate he executed pursuant to Rule 42(a) the district judge in Panico found that "there is nothing insane about this man whatever." 308 F.2d at 127. No such finding was made in connection with the contempt citation in this case, and, as the Supreme Court's disposition of the Panico case shows, such a finding if made without a hearing would not sustain appellant's contempt conviction and would, indeed, be beyond the power of a judge to make in a Rule 42(a) proceeding, based as it must be not solely upon on what the judge has seen or heard but at least in part upon what someone has testified.

In light of the substantial question concerning appellant's sanity that had been raised at the trial -- and especially in view of the judge's statements evincing his awareness that a question existed whether appellant was sane at the time the contumacious act took place -- it was error to convict appellant of contempt without first holding a plenary hearing pursuant to Rule 42(b) to explore the question of appellant's sanity at the time of the incident in question. As in Panico v. United States, supra, the contempt conviction must be set aside and the cause remanded to the district court for such a hearing to be held.



I7. UNDER ALL THE CIRCUMSTANCES, THE CONTEMPT SENTENCE IMPOSED UPON APPELLANT IS EXCESSIVE AND SHOULD BE REDUCED BY THIS COURT UNLESS THE CAUSE IS REMANDED.

For a single isolated act that was the product -- if not of appellant's insanity -- then of a sudden, brief emotional outburst, and for which appellant subsequently apologized to the court (pp. 10-11, supra), appellant was sentenced summarily to imprisonment for one year in addition to his sentence on the robbery conviction. Moreover, the district judge contemplated even further punishment: Immediately following appellant's outburst, after stating that he would consider the question of appellant's contempt at the close of the trial, the judge went on to say that he would also "request the District Attorney to present this matter to the Grand Jury." (Tr. 134) As recommended by the judge, appellant was in fact subsequently indicted for assault with a dangerous or deadly weapon and for assault upon an Assistant United States Attorney engaged in the performance of his official duties and after the ensuing trial was given concurrent sentences of one to three years on each count, to begin to run after the sentences he was already serving, including the sentence for contempt, had expired. (D.D.C. Criminal No. 209-63.)

The record contains no indication whatever of any other impropriety on appellant's part throughout the entire

course of the robbery trial.<sup>7/</sup> Nor is there any indication that appellant's act was in any way deliberate or other than the product of an excess of emotion. Thus, for his single brief emotional lapse from proper demeanor, at a time when, as appellant later said, he "was fully unaware of what [he] was doing" (Tr. 173), appellant has been subjected to a prison term of two to four years.

It is, of course, well established that an appellate court reviewing a sentence imposed for contempt of court is not subject to the ordinary limitations upon appellate review of sentences. For example, in Green v. United States, 356 U.S. 165, 188 (1958), the Supreme Court said:

"We take this occasion to reiterate our view that in the areas where Congress has not seen fit to impose limitations on the sentencing power for contempts the district courts have a special duty to exercise such an extraordinary power with the utmost sense of responsibility and circumspection. The 'discretion' to punish vested in the District Courts by [18 U.S.C.] § 401 is not an unbridled discretion. Appellate courts have here a

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<sup>7/</sup> The petitioner in Panico v. United States, 375 U.S. 29 (1963), was sentenced to fifteen months for contempt. Outbursts by him during his trial apparently were "commonplace"; just one of the things he did was to climb into the jury box and walk from one end to the other, pushing jurors and "screaming vilifications at them, the judge, and the other defendants." See United States v. Bentvena, 319 F.2d 916, 929-30 (2d Cir.), cert. denied, 375 U.S. 940 (1963).



special responsibility for determining that the power is not abused, to be exercised if necessary by revising themselves the sentences imposed. This Court has in past cases taken pains to emphasize its concern with the use to which the sentencing power has occasionally been put, both by remanding for reconsideration of contempt sentences in light of factors it deemed important, and by itself modifying such sentences."

See also Yates v. United States, 355 U.S. 66 (1957), 356 U.S. 363 (1958); Nilva v. United States, 352 U.S. 385, 396 (1957); United States v. United Mine Workers, 330 U.S. 258, 304-05 (1947). This Court has not hesitated to use its power to reduce contempt sentences it found excessive. Offutt v. United States, 93 U.S. App. D.C. 148, 208 F.2d 842 (1953), rev'd on other grounds, 348 U.S. 11 (1954).

In recommending that appellant be indicted for assault over and above his contempt citation and conviction, the trial judge called attention to a factor that should have been -- but was not so far as appears -- taken into account in his determination of the appropriate sentence for appellant's acknowledgedly contumacious act. That factor was that the contempt citation was not the only sanction for appellant's act; that act might be and was punished in a separate criminal proceeding.<sup>8/</sup> The fact that appellant's act might have been

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<sup>8/</sup> One district court has held that an assault prosecution based upon acts for which the same person had previously been convicted of contempt was not barred by the constitutional prohibition against double jeopardy. United States v. Mirra, 220 F. Supp. 361 (S.D.N.Y. 1963).

a crime apart from the disruption it caused to the trial should not have affected the punishment meted out for the contempt. "An obstruction to the performance of judicial duty . . . is . . . the characteristic upon which the power to punish for contempt must rest." Ex parte Hudgings, 249 U.S. 378, 383 (1919); see In re Michael, 326 U.S. 224, 228 (1945). That so severe a sentence as one year's imprisonment was imposed upon appellant for the brief disruption caused by his isolated outburst of emotion suggests that considerations other than the extent to which that outburst obstructed "the performance of judicial duty" may, however unconsciously, have influenced the sentencing. Surely, a sentence of one year would have been grossly excessive had the act consisted solely of throwing a water pitcher at the courtroom wall;<sup>9/</sup> the fact that it was thrown instead at a person in the courtroom did not so significantly increase the disruptive, contumacious quality of the act as to justify the harsh punishment meted out.

Thus, even if the contempt judgment is not vacated, as it should be, for a plenary hearing under Rule 42(b), the Court should either reduce appellant's sentence or remand to

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<sup>9/</sup> The appellants in United States v. Galante, 298 F.2d 72 (2d Cir. 1962), had each been sentenced to only 20 days' imprisonment for disruptions of their criminal trial. The court of appeals characterized appellant Mirra's 20-day sentence for his sustained refusal to obey the trial judge's order to be silent as "severe." 298 F.2d at 75.



the district court for an appropriate reduction in sentence. If the cause is remanded for a plenary hearing pursuant to Rule 42(b), the district court should be admonished that a sentence of anything like a year's imprisonment for a single regrettable and regretted courtroom outburst would be grossly excessive.

- V. THE TRIAL COURT SHOULD HAVE DECLARED A MISTRIAL AFTER APPELLANT'S OUTBURST IN THE PRESENCE OF THE JURY SHORTLY BEFORE THEY WERE TO RETIRE TO DELIBERATE HIS FATE, AND IN ANY EVENT IF IT IS DETERMINED AFTER A HEARING THAT APPELLANT WAS NOT MENTALLY RESPONSIBLE FOR HIS COURTROOM OUTBURST THERE MUST BE A NEW TRIAL ON THE ROBBERY CHARGE BECAUSE OF THE PREJUDICIAL EFFECT OF THAT OUTBURST.

A. Shortly before the jury was to retire to decide whether he was guilty or innocent of robbery, a crime of violence, appellant in the presence and full view of the jurors committed a violent act. (P. 10, supra). In the absence of any indication that the act was committed deliberately for the purpose of inducing a mistrial, the trial court was bound at that point to declare a mistrial. No matter how conscientiously the court might thereafter instruct the jury to disregard the incident (except as it might bear upon appellant's mental condition), the effect of so striking and dramatic an incident, fresh in mind as the jurors deliberated, could only be gravely to prejudice appellant's case. The appellant had taken the

stand to deny that he committed the alleged robbery. He told a circumstantial story, at odds with the stories of the prosecution witnesses, and he told it in the full knowledge that his testifying would permit the prosecution to inform the jury of his prior convictions of violent offenses. (Pp. 3-4, supra). Now with this further incident he was made to run the very real risk that he would be convicted not because the jury upon analysis believed the prosecution witnesses and disbelieved him but because he was a person who had shown himself capable of violent action even in a place where to a unique extent decorum is the rule. It is a fact that despite the conflicts in the testimony the jury deliberated for only twenty-seven minutes. (Tr. 166).

The Court of Appeals for the Fifth Circuit has held that a trial court must secure a fair trial to a defendant by declaring a mistrial in circumstances like those of this case. In Braswell v. United States, 200 F.2d 597 (5th Cir. 1952), a defendant had made an attack in the courtroom upon a United States Marshal. On appeal his conviction (of a narcotics offense, not a crime of violence) was reversed. The court said:

"Ample power rested with the court to punish Hoffman for contempt, which was done. Denial of a fair trial is beyond the range of such punishment. It did not appear that Hoffman's violence was



deliberately staged for the purpose of inducing a mistrial. . . . Even under the most trying circumstances, every needed power of the court must be exerted to guarantee and make effective a right of such transcendent importance as the right to a fair trial." 200 F.2d at 602.<sup>10/</sup>

B. Under Panico v. United States, 375 U.S. 29 (1963), the appellant's conviction of contempt must be set aside and the matter remanded for a hearing pursuant to Fed. R. Crim. P. 42(b). (See pp. 36-41, supra). Even if the foregoing view that the robbery conviction must be set aside for failure to declare a mistrial because of the allegedly contumacious incident in the courtroom is rejected, cf. United States v. Bentvena, 319 F.2d 916, 929-31 (2d Cir.), cert. denied, 375 U.S. 940 (1963), the judgment of conviction of robbery should be vacated so that disposition of that cause may abide the Rule 42(b) hearing. This is so because if it is determined upon that hearing that appellant was not responsible, by reason of insanity, for the incident that marred his trial, the robbery conviction must be set aside and a new trial ordered. If appellant was not responsible

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<sup>10/</sup> It should be noted that the trial court would not have risked immunizing appellant from further prosecution by declaring a mistrial. In Gori v. United States, 367 U.S. 364 (1961), the Supreme Court rejected a contention that the prohibition against double jeopardy was violated by a retrial following a declaration of mistrial that had not been requested by the defendant but was for his benefit.

for what happened in the courtroom, the situation is no different from one in which prejudice is caused by the actions of or inadmissible testimony of some third party. Under such extremely prejudicial circumstances as obtained in this case, it is not sufficient that the judge simply instruct the jury to ignore what happened. See, e.g., Throckmorton v. Holt, 180 U.S. 552, 567 (1901); Boyer v. United States, 76 U.S. App. D.C. 397, 132 F.2d 12 (1942); Mora v. United States, 190 F.2d 749, 752 (5th Cir. 1951); United States v. Laughlin, 222 F. Supp. 264 (D.D.C. 1963). The prejudicial effect of the appellant's being made to appear in the eyes of the jury as a man capable of violence by an act that in legal contemplation could as well have been that of a stranger could not be erased.

#### CONCLUSION

For the foregoing reasons, the judgment of conviction of robbery should be reversed and, depending on the ground assigned for reversal, the cause remanded with directions to enter a judgment of not guilty by reason of insanity or for a new trial; the judgment that appellant was in contempt of court should be reversed and the cause



remanded for a plenary hearing pursuant to Fed. R. Crim. P. 42(a) or, failing that, the excessive sentence of one year's imprisonment for contempt should be reduced.

Respectfully submitted,

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February 1964

WILBUR K. MILLER

BRIEF FOR APPELLEE

United States Court of Appeals  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

\_\_\_\_\_  
No. 17,675  
\_\_\_\_\_

ROOSEVELT ROLLERSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

\_\_\_\_\_  
Appeal from the United States District Court  
for the District of Columbia  
\_\_\_\_\_

DAVID C. ACHESON,  
*United States Attorney.*

FRANK Q. NEBEKER,  
MAX FRESCOLN,  
*Assistant United States Attorneys.*

United States Court of Appeals  
for the District of Columbia Circuit

FILED APR 3 1964

*Nathan J. Paulson*  
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## QUESTIONS PRESENTED

In the opinion of the appellee, the following questions are presented:

1) Where appellant raised the defense of insanity in his trial for robbery, and where there was substantial evidence that appellant was without mental disease or defect at the time of the offense, did not the judge properly submit the question of appellant's responsibility to the jury?

2) Did not the instructions, which were not objected to, properly inform the jury that the burden of proof was on the Government to prove beyond a reasonable doubt that appellant was without mental disease or defect, or if not without mental disease or defect, that the crime was not the product of the abnormal mental condition?

3) Did not the instructions, which were not objected to, properly inform the jury that they were the triers of fact, and that they were not bound by the opinions and conclusions of the psychiatrists in considering appellant's defense of insanity?

4) Where both the Government's case and the defense case were closed, and where appellant threw a plastic water pitcher at the prosecutor, which struck him, and shattered against his shoulder, and where appellant did not move for a mistrial, nor move for a new trial subsequent to trial, and where appellant considered that the incident went to the defense of insanity, was the judge required *sua sponte* to declare a mistrial?

5) Where the judge certified that he saw and heard the contumacious conduct of appellant and that it occurred in his presence, and where the judge had heard the testimony concerning appellant's responsibility for his conduct, and where there has been no post-trial circumstance, such as a finding that appellant is insane, calling for a plenary hearing, did not the court properly exercise the summary procedure under Rule 42(a), Fed. R. Crim. P. for finding appellant in contempt of court?

6) Was not the sentence of one year's imprisonment for contempt an appropriate exercise of the court's discretion?

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# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 17,675

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ROOSEVELT ROLLERSON, APPELLANT

*v.*

UNITED STATES OF AMERICA, APPELLEE

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Appeal from the United States District Court  
for the District of Columbia

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BRIEF FOR APPELLEE

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## COUNTERSTATEMENT OF THE CASE

On September 4, 1962, an indictment was filed charging appellant with robbery (22 D.C.C. 2901). After a jury verdict of guilty on February 14, 1963, by Judgment and Commitment filed February 21, 1963, appellant was sentenced to imprisonment for three to nine years. Also, on February 21, 1963, the District Court filed its Finding of Fact, Certificate and Order holding appellant in contempt, and sentencing him to imprisonment for one year, the sentence to commence on the expiration of the sentence for robbery. This appeal followed.



The complainant, Mrs. Bessie Dye, testified that in the early morning of July 22, 1962, she was on her way home from the home of her daughter and son-in-law, where she had been baby-sitting (Tr. 2). When she got in front of her house, 723 G Street, N.W., appellant tried to take her pocketbook which contained \$63 from her (Tr. 2-4, 9). She struggled with him until the straps on the pocketbook broke, when appellant grabbed the pocketbook, and Mrs. Dye fell down (Tr. 5). Appellant then ran across the street, through the alley and down Fourth Street (Tr. 5). Mrs. Dye saw a police officer standing on the corner of Third and G Streets, and she ran to him and told him about the robbery (Tr. 5-6). She saw appellant running down Fourth Street (Tr. 6). The policeman ran down Third Street, and out F Street, and caught appellant (Tr. 6). She identified appellant on the scene as the man who stole her pocketbook (Tr. 6-7). At the precinct appellant said to her "Lady, I'm sorry for what happened" (Tr. 8).

Leslie L. Williams, the policeman who arrested appellant, testified that after Mrs. Dye reported the robbery to him, he chased appellant to Fourth and G Streets, where he apprehended him (Tr. 24-26). Appellant "said that he was sorry" at that time (Tr. 29). Mrs. Dye's purse was recovered from the back of a pickup truck where appellant had thrown it (Tr. 32, 35, 40). At the precinct Mrs. Dye's change purse was found in appellant's shirt pocket (Tr. 30).

Appellant testified that he had not taken the pocketbook, and happened to be in the area looking for a friend (Tr. 45, 47-49). Appellant also raised the defense of insanity. He introduced a letter he had written to the superintendent of the jail while awaiting trial (Tr. 81). He had written in the letter that he knew that the jail authorities were trying to serve him poisoned food, and that voices told him not to eat it (Tr. 81-82). Appellant also introduced evidence that the jail authorities transferred him to a special cell-unit for troublesome or un-

balanced inmates (Tr. 83, 86). He also introduced a medical record from the jail reflecting that the jail authorities removed a sharpened piece of metal from his possession. The record contained the notation: "States that he had intended to harm self quick, not talking, on admission." (Tr. 84).

In rebuttal to appellant's insanity defense, the Government called three psychiatrists. Dr. Morris M. Platkin testified that he examined appellant at a staff conference, and on the basis of all the information about appellant, including various tests given him at St. Elizabeths Hospital, he was of the opinion that appellant was not suffering from a mental illness or disorder on the date of the staff conference, or the date of the offense (Tr. 88-92). Dr. Platkin testified that in his opinion appellant could distinguish between right and wrong, and that appellant was able to exercise control over his actions and behavior, on the date of the staff conference and on the date of the offense (Tr. 92-93). Dr. Platkin concluded that appellant was without mental disorder (Tr. 93).

Dr. David H. Dabney testified that he saw appellant on the ward at St. Elizabeths Hospital at least twice a week, and he attended the staff conference (Tr. 101-02). He was of the opinion that appellant had a mental disorder (Tr. 103). He testified he had the sociopathic personality disturbance, with antisocial reaction, which is a mental disorder, but was not a psychosis or neurosis (Tr. 104, 117). Dr. Dabney testified that appellant was impulsive. He said that impulsive "means that the individual is unpredictable of behavior; under certain stresses it is hard to predict how he would respond, or when he would respond, or react to a particular situation" (Tr. 112).

Dr. Glenn Legler testified that he examined appellant at the medical staff conference. On the basis of the information about appellant, including various tests given appellant at St. Elizabeths Hospital, Dr. Legler formed the opinion that appellant was without mental disorder, disease, or defect then and at the time of the offense



charged (Tr. 118-125). Dr. Legler testified that appellant knew right from wrong then and at the time of the offense (Tr. 125). He testified that in his opinion appellant was not suffering then or at the time of the offense from any type of mental disorder, defect, or disease, which would make him unable to control his mental or emotional processes, or would impair his behavior (Tr. 126).

At the conclusion of the psychiatric testimony, the Government rested (Tr. 130). Trial was recessed until the following day (Tr. 130). Just after trial began the next morning, at 10 A.M., appellant threw a plastic water pitcher at the prosecutor. The pitcher struck the prosecutor (Tr. 132, 133). The court excused the jury (Tr. 132). Appellant's trial counsel considered having the court instruct the jury to disregard the incident, but withdrew the request (Tr. 133). The court advised that he would "consider contempt committed in the presence of the court at the time of sentence, if he is convicted in this case. If he is acquitted, I will consider it immediately after the acquittal." (Tr. 134). After closing arguments, where counsel avoided discussion of the event, the court advised appellant's counsel that he might instruct the jury about the incident to the effect:

"You may not consider that, on the question of his guilt or innocence of the offense charged, but you may consider it on the question of his mental condition, that is, whether the conduct of the defendant stemmed from a mental disease or whether it was feigned to persuade you that he had a mental disease." (Tr. 145).

Trial counsel told the court he thought the charge would be helpful, and specifically requested it (Tr. 145-46). The court instructed the jury on the matter as requested (Tr. 149).

In the jury charge, the judge gave thorough instructions on the defense of insanity (Tr. 152-153, 157-165). He also instructed on the credibility of witnesses and on

the weight to be given to the psychiatrists' opinions and conclusions. (Tr. 147-148; 153, 159). After the jury returned its verdict of guilty, the court informed counsel that at the time of sentence he would consider the question of punishment for contempt (Tr. 166, 167).

On the day of sentencing counsel informed the court he did not intend to file a motion for new trial (Tr. 170). Before the judge imposed sentence for the robbery, appellant apologized for "what happened in the courtroom" (Tr. 171). After sentencing appellant for the robbery, the court asked counsel whether he had anything to say why he should not hold appellant guilty of contempt of the authority of the court, committed in the court's presence. Counsel suggested to the court that the water pitcher incident was a result of appellant's impulsiveness which one of the psychiatrists had testified about. The appellant again apologized, and said he was unaware of what he was doing. The judge found appellant in contempt (Tr. 174).

#### STATUTES AND RULE INVOLVED

Title 22, D. C. Code, Section 2901 provides:

Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

Title 18, U. S. Code, Section 402, provides in pertinent part:

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice; \* \* \*



Rule 42, Federal Rules of Criminal Procedure provides:

(a) *Summary Disposition.* A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) *Disposition Upon Notice and Hearing.* A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

#### SUMMARY OF ARGUMENT

The evidence on the issue of whether appellant was without mental disease or defect was in conflict. There was significant evidence by two psychiatrists that he was without mental disease or defect. Thus, the issue was properly one for the jury. Appellant may not complain of the instructions on appeal, for he did not object to them below. Furthermore, read as a whole, the instructions clearly placed the burden of proof on the Government to prove beyond a reasonable doubt that appellant

was sane, or if he had a mental disease or defect, that the crime was not a product of the abnormal mental condition. The instructions also properly informed the jury how they should evaluate the psychiatrist's testimony. They clearly instructed the jury that they were not bound by the opinions and conclusions of the psychiatrists. When appellant threw a water pitcher at the prosecutor, striking him, the judge was not bound to declare a mistrial in the interests of justice, where appellant did not want one, and where appellant thought the conduct went to his defense of insanity. The jury was instructed to the effect that they should not let the episode bear on their deliberations other than as to whether the act might go to insanity, or may have been feigned to support the insanity defense. The interests of justice would not be served by allowing a defendant's own conduct at the conclusion of all the evidence to guarantee him a new jury. The District Court properly used the summary procedure under Rule 42(a), Fed. R. Crim. P. for finding appellant in contempt of court. The judge certified that he saw and heard the contumacious conduct, and that it was committed in his presence. From the trial testimony the judge was well aware of the evidence that went to the question of appellant's responsibility for crime. There has been no post-trial finding indicating that appellant is presently insane, so there is no circumstance calling for a hearing under Rule 42(b), Fed. R. Crim. P. The sentence of one year for contempt was a proper exercise of the judge's discretion. Appellant's conduct was highly contumacious. Appellant is unable to demonstrate that the judge abused his discretion.

### ARGUMENT

- I. The issue of appellant's responsibility for the robbery was properly submitted to the jury.

(See Tr. 82-126.)

There was no evidence that there was a productivity relationship between the crime and a mental disease or



defect in appellant. Appellant's evidence of insanity was in conflict with the Government's rebuttal evidence. The evidence supporting appellant's insanity defense included: a letter he wrote to the jail authorities claiming voices told him the jail food was poisoned and not to eat it; evidence that the jail authorities put him in a special cell unit for troublesome and unbalanced inmates, and that while there the authorities took a sharp instrument from him, which he then said he was going to use to harm himself; and evidence by a psychiatrist, Dr. Dabney, that in his opinion appellant did not have a psychosis or neurosis, but that he did have a mental illness, the sociopathic personality disturbance, anti-social reaction, and that appellant was impulsive. In contrast to that evidence, Dr. Platkin and Dr. Legler both testified that in their opinion appellant was without mental disorder or disease when they examined him and at the time of the offense. With the evidence in conflict, the issue was properly one for the jury. See *McDonald v. United States*, 114 U.S. App. D.C. 120, 312 F.2d 847 (1962); *Hawkins v. United States*, 114 U.S. App. D.C. 44, 310 F.2d 849 (1962); *Williams v. United States*, 114 U.S. App. D.C. 135, 312 F.2d 862 (1962), *cert. denied*, 374 U.S. 841; *Blocker v. United States*, — U.S. App. D.C. —, 320 F.2d 800 (1963); *Rivers v. United States*, No. 17950, decided March 5, 1964.

- II. The instructions on the insanity defense correctly placed the burden of proof on the Government to prove beyond a reasonable doubt that appellant was sane, or if he was insane, that the crime was not a product of the mental condition.

(See Tr. 82-126, 147-165.)

Counsel advised the court that he had no objection to the instructions. Failure to make objection precludes his raising the issue on appeal unless there was plain error affecting substantial rights. Rule 30, Federal Rules of Criminal Procedure; *Blocker v. United States*, *supra*;

*Jones v. United States*, 113 U.S. App. D.C. 233, 307 F.2d 190 (1962); Rule 52(b), Federal Rules of Criminal Procedure. Because of the dearth of evidence that the robbery was a result of appellant's abnormal mental condition, the substantial rights of appellant could not possibly have been affected by the alleged lapse of the court in his detailed instruction on insanity and on the burden of proof regarding that defense.

The instructions must be read as a whole. *Kinard v. United States*, 69 App. D.C. 322, 323, 101 F.2d 245, 247 (1938); *Askins v. United States*, 97 U.S. App. D.C. 407, 412, 231 F.2d 741, 746, cert. denied, 351 U.S. 989 (1956). So read, the instructions correctly placed the burden of proof on the Government to establish appellant's sanity beyond a reasonable doubt, or if insane, that the crime was not a product of the illness beyond a reasonable doubt. The instructions informed the jury that the Government must establish appellant's guilt and all the elements of the offense beyond a reasonable doubt (Tr. 149, 154-55). The court told the jury that there is ordinarily a presumption of sanity, but once the issue of sanity is raised:

the presumption disappears and has no evidentiary weight<sup>1</sup> and the Government has the burden of proving beyond a reasonable doubt that the defendant was mentally responsible for his act on the date charged in the indictment \* \* \*. (Tr. 155-56).

After summarizing the evidence of insanity the court told the jury:

It will be your duty to weigh all this relevant evidence and determine whether the government has established beyond a reasonable doubt that the defendant was not suffering from a diseased or defective mental condition at the time in question, or that

<sup>1</sup> In *Greene v. United States*, 114 U.S. App. D.C. 266, 314 F.2d 271 (1963) this Court pointed out that the presumption of insanity remains in the case even after it is called question.



the act was not the product of such condition, if one existed. Unless you believe beyond a reasonable doubt that he was not suffering from a diseased or defective mental condition at the time in question, or that the act was not the product of such condition, if one existed. Unless you believe beyond a reasonable doubt that he was not suffering from a diseased or defective mental condition, or, if he was, that the criminal act was not the product of such condition, you must find the defendant not guilty by reason of insanity. (Tr. 160).

Then the court discussed what the defense of insanity entailed (Tr. 160-164). He spoke of the necessity that there be a productivity relationship between a mental illness or defect and the crime in order for the defendant to be relieved from responsibility (Tr. 160-163). During this portion of the charge, the court referred to what the jury must consider if there was a "finding" that the defendant was insane: namely, they must be able reasonably to infer that the crime was a product of the mental illness. Appellant argues that in this portion of the charge the judge put the burden of proving insanity on him. However, this Court, apparently to make sure the jury would not so misunderstand, then restated that the burden of proof was on the Government:

Now, what I have said to you is in some respects the manner of stating the defense. As I have told you, the burden of proof in respect of this defense is on the Government, and the issue to be put to you is whether the Government has met this defense beyond a reasonable doubt in order to return a verdict of guilty, notwithstanding the defense of insanity, that the accused is free of mental disease or defect, as I have defined those terms, or finding that he had a mental disease or defect, that no relationship existed between the disease or defect and the criminal act which would justify the conclusion that "but for the mental disease or defect" the act would not have been committed.

Therefore, if you believe beyond a reasonable doubt either that he was not suffering from a mental disease or defect, or, if he was, that the alleged criminal act was not the product of such abnormality, you may convict if you find him to be otherwise guilty. (Tr. 164-165).

Under such instructions the jury certainly understood where the burden of proof lay. See *Redfield v. United States*, No. 17818, decided January 30, 1964; Cf., *Greene v. United States*, *supra*.

III. The court properly instructed the jury on how it should evaluate the psychiatrist's testimony.

(See Tr. 147-165.)

Nothing in the court's charge to the jury suggested that the jury was bound by the expert testimony of the psychiatrists as to their clinical conclusions. The judge did tell the jury they were the judges of the facts (Tr. 147). He instructed regarding the testimony of the witnesses:

\* \* \* [I]n weighing and evaluating the testimony of the witnesses you will not put aside your common sense and your experiences in life. You will bring them into play when you determine the amount of credit you will give to the testimony of each witness who has appeared before you. Because, as judges of the facts, you are of necessity the judges of the credibility of the witnesses \* \* \*. (Tr. 147-48.)

The judge spoke to the jury of "weighing" the testimony of the psychiatrist (Tr. 153):

In weighing their testimony you will take into consideration their experience and training, the opportunity they had to form an opinion, the reasons given by them for their opinion in determining how much weight you will give to the opinion of each of the psychiatrists who have testified. In connection with the defense of insanity you should also consider the documents from the jail file which have been received in evidence, as well as the defendant's demeanor on the stand \* \* \*. (Tr. 153.)



The judge properly told the jury that:

\* \* \* [I]n the final analysis on the issue of <sup>N</sup>sanity or insanity, like all other issues of fact, is to be determined by you and you will be required to decide whether the government has established beyond a reasonable doubt that the defendant was not suffering from a disease, mental condition or defect at the time in question, or that the act was not the product of such a condition, if one existed.

While it is proper for you to consider the opinions of experts you are not bound to follow the conclusions of any one of them, because in the final analysis the issue of sanity or insanity is to be determined by you, the jury. (Tr. 159).

The Court instructed the jury in detail what "mental disease or mental defect" meant (Tr. 160-63). He specifically told the jury that:

Mental disease and mental defect includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior control (Tr. 160-161).

Clearly the judges instructions fulfilled the requirements of *McDonald v. United States, supra*, so that the jury could properly perform its function in making its determination about appellant's responsibility for the robbery.

Even if the judge's instruction had been deficient by implying that appellant's responsibility turned exclusively on the label attached to his condition by the psychiatrists, it would not be grounds for reversal, for appellant did not object to the instructions, and he can not show plain error under Rule 52(b), Fed. R. Crim. P. See *Blocker v. United States, supra*.

IV. There was no necessity that the court declare a mistrial when appellant threw a water pitcher at the prosecutor and struck him with it.

(See Tr. 131-134, 145-146, 149.)

Counsel did not request a mistrial when appellant threw the water pitcher at the prosecutor. Appellant had raised

the defense of insanity, and part of the evidence of insanity was that he was "impulsive." Counsel apparently considered that the incident might support his defense of insanity (Tr. 133). Counsel requested the judge to instruct the jury that it might consider the episode in relation to the defense of insanity (Tr. 145-146). The court so instructed (Tr. 149). He also instructed the jury to the effect that it could not consider the episode in otherwise considering appellant's guilt or innocence of robbery (Tr. 149). On the day of sentencing the court inquired of counsel whether he was going to make a motion for a new trial, and counsel said he was not. Despite appellant's wish that the trial continue, and although he did not move for a new trial, he argues that the court had to declare a mistrial, and that this Court should grant him a new trial.

Even where a motion is made, whether or not to declare a mistrial is in the discretion of the trial judge and it should be granted only upon a clear showing that its granting is necessary to prevent a miscarriage of justice. *McIntosh v. United States*, 114 U.S. App. D.C. 1, 309 F.2d 222 (1962); *Finley v. United States*, 271 F.2d 777 (5th Cir. 1959), *cert. denied*, 362 U.S. 979; *United States v. Gori*, 282 F.2d 43 (2d Cir. 1960), *aff'd* 367 U.S. 364. If an episode such as the one appellant created at trial after all the evidence was in, necessitated that a mistrial be declared, then all a defendant would have to do at the conclusion of his trial, if he suspected that he could not escape conviction, would be to stage a tantrum, thereby assuring himself a new jury to try the case. Justice would not countenance such consequences. Clearly, on the record in this case, the court was not obligated *sua sponte* to declare a mistrial. See *United States v. Bentvena*, 319 F.2d 916, 930 (2d Cir. 1963).



V. The District Court's procedure for finding appellant in contempt was proper.

(See Tr. 131-134, 168, 170-175.)

Appellant threw a water pitcher at the prosecutor, striking him. The judge certified that what he saw and heard was conduct constituting contempt; and he found that appellant's conduct constituted misbehavior in the court's presence which obstructed the administration of justice (Tr. 174). See 18 U.S.C. 401. Rule 42(a), Fed. R. Crim. P. provides that:

A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. \* \* \*

As the judge made the certification required by Rule 42(a), he properly punished appellant summarily.

Appellant was not entitled to a hearing pursuant to Rule 42(b), Fed. R. Crim. P., under the authority of *Panica v. United States*, 375 U.S. 29 (1963). The circumstances of that case were substantially different from those of appellant's case. In *Panica*, a contempt case, the Supreme Court concluded that where there were clearly contumacious acts, but where there was a question of the capability of Panica forming the necessary criminal intent, there had to be a Rule 42(b) hearing, although the acts were in the judge's presence. The circumstances which the Supreme Court said required the plenary hearing were (1) the conflicting testimony at the trial during which the contumacious acts occurred on Panica's mental capacity to stand trial, and (2) the finding by state-appointed psychiatrists that Panica was suffering from schizophrenia, and that he was committed to a state mental institution shortly after the contempt conviction. The Supreme Court apparently considered the latter circumstance of great importance. It cited *Bush v. State*, 372 U.S. 586 (1963) where there was a remand of the case when subsequent to trial, Bush was found to

be schizophrenic, and only partially responsible for his conduct.

Any superficial resemblance between *Panica* and appellant's case, which may be found because there was a question of appellant's responsibility for the crime of robbery, is dispelled on considering the pertinent differences between the two cases. In the instant case, unlike the situation in *Panica*, the judge had heard testimony from which he could conclude that appellant's contumacious act was not the product of an abnormal mental condition or that appellant was without mental disease or defect.<sup>2</sup> Also, in the instant case there has been no finding subsequent to trial that appellant is insane. Appellant is serving his time in jail. See 24 D.C.C. 302. Before appellant was tried in Criminal No. 209-63 for two felonies<sup>3</sup> arising out of his attack on the prosecutor with the water pitcher, he was committed to St. Elizabeths Hospital for a 90-day mental observation. The District Court file in Criminal No. 209-63 reflects that a letter dated June 25, 1963, from Dale C. Cameron, M. D., Superintendent of St. Elizabeths Hospital advised the District Court that appellant was mentally competent to stand trial, and that the hospital found no mental disease or defect existing then or on or about February 14, 1963, the date of the crimes. There is no indication in the District Court file that appellant raised the insanity defense at his trial for the offenses. No appeal was taken from the convictions. Thus, a comparison of the circumstances of appellant's

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<sup>2</sup> The court never indicated that he thought appellant's conduct may have been the result of mental abnormality. The record reflects that the court was intent on giving appellant any possible benefit he might reap from the episode, by instructing the jury that it might consider the episode with respect to the insanity defense. (See. Tr. 133, 145, 149.) The judge's finding that appellant was in contempt shows he had no question that the contumacious conduct was accompanied by a criminal intent.

<sup>3</sup> The felonies charged in Criminal No. 209-63 were assault with a dangerous weapon (22 D.C.C. 502) and assault on an employee while he is engaged in the performance of his official duties (18 U.S.C. 111).



case with the *Panica* case, shows the cases are dissimilar, and that the circumstances of appellant's case would not require the judge first to hold a Rule 42(b) hearing before finding appellant in contempt.

VI. The sentence the court gave appellant for contempt was a proper exercise of his discretion.

(See Tr. 131-134, 170-175.)

The judge sentenced appellant to one year's imprisonment for contempt of court. Appellant had struck an officer of the court with a plastic water pitcher, hurled with such force that it shattered against his shoulder (Tr. 174). That conduct constituted the commission of a felony in the judge's presence. The judge had to excuse the jury from the courtroom (Tr. 132, 174). More contumacious conduct is rarely heard of. The sentence that the judge may impose for misbehavior of a person obstructing the administration of justice is discretionary, and is open to review only for arbitrary use of the power in abuse of discretion. *United States v. Galante*, 298 F.2d 72 (2d Cir. 1962); *United States v. Levin*, 288 F.2d 272 (2d Cir. 1961); *Shibley v. United States*, 236 F.2d 238 (9th Cir.), *cert. denied*, 352 U.S. 873 (1956). Appellant is unable to demonstrate here that the judge abused his discretion.

#### Conclusion

WHEREFORE, it is respectfully requested that the judgment of the District Court be affirmed and the conviction for contempt be affirmed.

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REPLY BRIEF FOR APPELLANT

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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,675

ROOSEVELT ROLLERSON,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District  
Court for the District of Columbia

United States Court of Appeals  
for the District of Columbia Circuit

FILED APR 10 1964

*Nathan J. Paulson*  
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April 1964

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REPLY BRIEF FOR APPELLANT

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The Government's brief presents no substantial arguments tending to undermine the showing in appellant's brief that both appellant's robbery conviction and his contempt conviction should be reversed. Such arguments as the Government makes are answered in the following reply brief to the extent that they were not anticipated by us.

- I. THE GOVERNMENT HAS SHOWN NEITHER THAT THERE WAS EVIDENCE OF SANITY SUFFICIENT TO TAKE THE QUESTION TO THE JURY NOR THAT THE TRIAL COURT'S INSTRUCTIONS ON THE INSANITY ISSUE DID NOT CONSTITUTE PLAIN ERROR IN LIGHT OF THE WEAKNESS, AT BEST, OF THE GOVERNMENT'S SHOWING OF SANITY.

A. The Government's argument that the prosecution's evidence of appellant's sanity was adequate is as perfunctory as was that evidence at the trial. The Government merely states its bare conclusion that the bare conclusions of two psychiatrists that appellant was "without mental disorder or disease . . . at the time of the offense" put "the evidence in conflict" so as to make a case for the jury. (Appellee's Br., pp. 7-8). The Government does not even attempt to meet the basic point we made (Appellant's Br., pp. 20-27) -- that these bare, unexplained clinical conclusions were no better than no evidence of sanity at all. As this Court made altogether clear in Carter v. United States, 102 U.S. App. D.C. 227, 236, 252 F.2d 608, 617 (1957), "unexplained medical labels -- schizophrenia, paranoia, psychosis, neurosis, psychopathy [or, even more, mental disorder or disease] -- are not enough." We have shown in our opening brief the complete absence from the Government's perfunctory rebuttal of substantial and detailed evidence of insanity of any



testimony whatever of the descriptive and explanatory nature that this Court has made the sine qua non of jury deliberation on a question of insanity. Accordingly, it was error for the trial court to deny appellant's motion for a directed verdict of acquittal at the close of all the evidence.

B. The Government implies, without forthrightly urging that there was not enough evidence to go to the jury, that appellant's showing of insanity was defective because of the absence of an affirmative showing that there was a "productivity relationship" between the alleged crime and appellant's insanity. (Appellee's Br., pp. 7-8, 9). But this Court has held on numerous occasions that "the introduction of competent evidence of mental disorder raises the issue of causality sufficient for jury consideration." McDonald v. United States, 114 U.S. App. D.C. 120, 123, 312 F.2d 847, 850 (1962). Therefore, contrary to the Government's assertion, it was of the utmost importance that the jury be properly instructed on an issue, that of appellant's mental responsibility, that was -- assuming no directed verdict -- properly before it. In two respects, instructed.

In arguing that the instructions concerning the Government's burden of proof on the insanity issue were satisfactory because they included some passages in which the burden was properly stated, the Government entirely ignores this Court's decisions in such cases as Blocker v. United States, 110 U.S. App. D.C. 41, 288 F.2d 853 (1961), and the practical requirements of the 70-year-old doctrine they apply. The Government urges that the instructions must be read "as a whole." We agree. We submit that if the instructions are read as a whole one cannot state with the requisite certainty that one or some or all of the jurors were not led to believe that they must find affirmatively that appellant was insane in order to acquit by reason of insanity.

Nor do the Government's carefully selected excerpts from the insanity charge provide any basis for the confidence a reviewing court must have that all or even some of the jurors understood the way in which they were to consider the conclusory statements that characterized the psychiatric testimony on which the Government relied. Statements, as in the passages quoted in the Government's brief (pp. 11-12), to the effect that the jury must weigh experts were, of course, not adequate to satisfy the trial



court's obligation in this regard. The important point -- which was made clear nowhere in the charge -- was that the jury's duty was not simply to accept or reject the tidy clinical conclusions of the experts phrased in terms of the magical "disease or defect" formula, but to apply its own different, legal test phrased in those same words to such underlying data as were presented to it in descriptive and explanatory discussions of appellant's personality. Thus, the charge did not bring home to the jurors the essential ground rules defining how they were to proceed to formulate their collective judgment on appellant's sanity.

Especially in view of the weakness, at best, of the Government's evidence tending to prove appellant sane -- evidence that must satisfy the jury beyond a reasonable doubt -- these glaring inadequacies and defects in the instructions on the insanity issue constituted plain error affecting appellant's substantial rights. Durham v. United States, 99 U.S. App. D.C. 132, 237 F.2d 760 (1956); Stewart v. United States, 94 U.S. App. D.C. 293, 214 F.2d 879 (1954). See also, e.g., Taylor v. United States, 95 U.S. App. D.C. 373, 222 F.2d 398 (1955); Haner v. United States, 315 F.2d 792 (5th Cir. 1963).

II. THE GOVERNMENT HAS NOT SHOWN THE REQUIREMENT OF A SANITY HEARING ESTABLISHED BY THE SUPREME COURT TO BE INAPPLICABLE TO APPELLANT'S CONTEMPT CONVICTION.

The Government's efforts to distinguish the circumstances surrounding appellant's contempt conviction from those that compelled reversal in Panico v. United States, 375 U.S. 29 (1963), are to no avail. The Government argues that this case differs from Panico because here "the judge had heard testimony from which he could conclude" that the contumacious act was not the product of insanity. (Appellee's Br., p. 15). The trial judge in the Panico case too had heard testimony from which he not only could but did conclude that "there is nothing insane about this man whatever." United States v. Panico, 308 F.2d 125, 127 (2d Cir. 1962). The very making of this finding laid bare the defect in the procedure the trial judge followed. Rule 42(a) permits use of the very summary contempt process it authorizes only "if the judge certifies that he saw or heard the conduct constituting the contempt . . . ." Where the judge must rely on testimony as proving the mental element of the "conduct constituting the contempt," he cannot make the certification required by the rule. See United States v.



Panico, supra at 129-30 (Friendly, J., dissenting).

This is quite aside from the fact that here the trial judge did not in fact draw the conclusion the Government now says he could have drawn.

The Government also points to the fact that the Supreme Court mentioned in Panico's case that after the contempt conviction he had been found to be suffering from schizophrenia and had been committed to a state mental institution. Nothing like that has happened here, the Government argues, and so this appellant is not entitled to the procedure that was held to be Panico's due. Of course, what had happened in Panico's case after his conviction was highly relevant to the disposition of his case. A circumstance such as a subsequent finding of insanity may quite appropriately move an appellate court to direct reconsideration of the sentence or some other action. In the Panico case the subsequent finding had that effect and more. Because it showed dramatically how substantial and serious was the issue of Panico's responsibility for his acts of contempt, it served to focus on the elementary proposition that where a substantial issue of fact is raised it can be resolved only in a proceeding suited for the resolution of such issues. This, in the case of contempt, is a notice and

hearing proceeding under Rule 42(b) and not a summary proceeding under Rule 42(a). The decision as to which of the two sections of the rule to proceed under must be made by the judge on the basis of what he has observed or been told at the time. The Supreme Court's reference in the Panico case to an event occurring after the time for making the choice had passed cannot be taken to mean, as the Government would have it, that a decision to proceed under Rule 42(a) will be upset only if some later event shows conclusively that the court estimated incorrectly the substantiality of the issue of the contempt defendant's mental condition. As a precedent to guide lower court action, the Panico case perforce looks to the time when a lower court makes its decision that may come under review.

III. THE GOVERNMENT HAS NOT SHOWN THAT  
APPELLANT'S CONTEMPT SENTENCE WAS  
NOT EXCESSIVE.

If the Government's platitudinous statement that contempt sentences are discretionary with the sentencing judge (Appellee's Br., p. 16) ever had any relevance to a case of a sentence of a year's imprisonment for misbehavior in a courtroom, it certainly has



none since the opinions of the Supreme Court in United States v. Barnett, 32 U.S.L. Week 4303 (U.S. April 6, 1964), were handed down.

That case concerned the right to a jury trial on a charge of contempt for disobedience of a court order. Claims to both a statutory right to jury trial on the facts of the case and a constitutional right to a jury trial in such cases generally were advanced and were rejected by the Court, 5 to 4. The majority opinion said, however, that

"effective administration of justice requires that this dictum be added: Some members of the Court are of the view that . . . punishment by summary trial without a jury would be constitutionally limited to that penalty provided for petty offenses." Id. at 4307 n. 12.

A one-year sentence such as was imposed on appellant is certainly greater than the sentence that could be imposed for a petty offense, see id. at 4325 (Goldberg, J., dissenting), even if so severe a sentence were arguably permissible for courtroom misbehavior. It is not. This is indicated by the dissenting opinion in the Barnett case of Mr. Justice Goldberg, speaking for himself, Mr. Chief Justice Warren and Mr. Justice Douglas. They would have sustained a constitutional right to a jury trial,

but Mr. Justice Goldberg said that he excluded from consideration in his discussion of that right the "trivial punishments traditionally deemed sufficient for maintaining order in the courtroom," citing a case wherein the Court reviewed a courtroom misbehavior contempt conviction that resulted in a sentence of 10 days in jail and a \$250 fine. Id. at 4324. Thus, the dissenters in the Barnett case and, for all that appears, the majority as well, proceeded on the assumption that cases of courtroom misbehavior typically draw only the most minor of sentences and thus do not pose a significant constitutional question in terms of the right to a jury trial.

The assumption appears to be well-founded. Just the other day, for example, a plaintiff in the District of Columbia Small Claims Court, disappointed by an adverse judgment, assaulted the defendant by rapping him over the head with her shoe. She was sentenced to 30 days for contempt, but this was very soon reduced to time served -- two days. The Washington Post, March 12, 1964, p. A3, col. 1; March 14, 1964, p. D1, col. 7. The Government has cited three cases in support of the proposition that a court's contempt sentencing power is broadly discretionary. One of these is an inapposite case involving disobedience of a court order in which, in any event, the sentence



was reduced on appeal from one year to six months.

United States v. Levine, 288 F.2d 272 (2d Cir. 1961).

In a second case, which did involve misbehavior in court, the appellate court spoke of a 20-day jail sentence as a "severe . . . punishment." United States v. Galante, 298 F.2d 72 (2d Cir. 1962). And in another case also involving courtroom misbehavior the court of appeals directed that a sentence of 30 days be reconsidered on remand. Shibley v. United States, 236 F.2d 238 (9th Cir.), cert. denied, 352 U.S. 873 (1956).

The factor emphasized by the Government as having properly moved the trial court to exercise its discretion in favor of a sentence comparable to that which might have been imposed after a jury verdict of guilty of a crime is that appellant's courtroom act constituted a felony. This does not in any way justify the severity of the contempt sentence. Quite the contrary. The mere commission of a felony in the court's presence is not in itself contempt, see, e.g., In re Michael, 326 U.S. 224 (1945); Ex parte Hudgings, 249 U.S. 378 (1919), and by the same token the fact that a contumacious act may also be a felony does not at all justify a penalty heavier than would otherwise be warranted. Insofar as the act of contempt was a felony appellant could be -- and was --

punished in a separate trial for that felony. But the contempt sentence should properly have been determined only on the basis of the relatively slight disruption of court processes the act occasioned.

Judged by this standard, appellant's one-year sentence was grossly excessive.

#### CONCLUSION

For the reasons set out in our main brief and in this reply brief, the convictions of the appellant should be reversed and the cases disposed of as urged in the Conclusion of the main brief.

Respectfully submitted,

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April 1964